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No. 97-1639

In the Supreme Court of the United States

OCTOBER TERM, 1997

ROBERT D. SPRAGUE, ET AL., PETITIONERS

v.

GENERAL MOTORS CORPORATION, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF FOR THE RESPONDENT

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SUPPLEMENTAL BRIEF FOR THE RESPONDENT

Pursuant to Supreme Court Rule 15.8, which permits a respondent to address amicus briefs filed contemporaneously with its brief in opposition, General Motors Corporation submits this response to the amicus filings of the American Association of Retired Persons ("AARP") and Donald Armbruster.

1. AARP contends (at 4) that the Sixth Circuit's en banc decision "upsets the status quo" by "invalidating the business practice of offering ERISA-covered benefits as consideration for an employee's release of potential legal claims." Beyond question, however, agreements to provide retirement benefits in exchange for the release of claims remain enforceable in the Sixth Circuit, as elsewhere. As the Seventh Circuit recognized in *Frahm*, the en banc court "did not deny" the enforceability of bilateral contracts specifying retirement benefits. 137 F.3d at 958. To the contrary, it acknowledged that an employer may vest a particular level of benefits "'by agreement or by private design.'" Pet. App. 18a. The court simply found, as a factual matter, that GM did not promise that deductibles and copayments would never change.

There is no inconsistency between the Sixth Circuit's ruling and *White* v. *General Motors Corp.*, 908 F.2d 669 (10th Cir. 1990), or *Seward* v. *General Motors Corp.*, 805 F. Supp. 623 (N.D. Ill. 1992). AARP Br. 7. In those cases, courts enforced written retirement agreements that released potential claims against the employer in exchange for specified consideration. That is hardly at odds with the Sixth Circuit's ruling that plaintiffs' self-serving interpretations of informal communications do not override the explicit terms of GM's formal ERISA plan. The early retirement agreements here did not even mention health care benefits. Pet. App. 6a-7a. Instead, plaintiffs relied on informal communications that the court of appeals found merely described existing benefits, without either "stat[ing] or impl[ying] that [those] benefits were vested." Pet. App. 22a-23a.

AARP's argument (at 7-11) that early retirees need a good health care plan is another red herring, for there is no dispute that the GM health plan is a generous one. Since 1988, when the changes at issue occurred, GM has voluntarily raised retirement benefits and significantly enhanced medical and dental coverages. Pet. App. 128a n.6. Despite the copayments and deductibles, GM

employees have continued to apply for early retirement at a record pace. C.A. App. 808.

GM's adoption of modest copayments and deductibles—which can be avoided by choosing HMO coverage (Pet. App. 230a n.4)—merely brought GM's plan into line with the vast majority of company-sponsored plans nationwide. GM Opp. 11 n.2. Use of copayments and deductibles in place of "first dollar" coverage has been an important restraint on skyrocketing health care costs. Responsibility for such payments effectively counters the "incentive to overconsume" created when a third party pays all medical costs. Congressional Budget Office, *Economic Implications of Rising Health Care Costs* 18 (Oct. 1992). As a result, virtually all modern health plans, including those offered by the federal government, are built on the premise that "cost sharing should be part of any program of health care financing." Havighurst, *Prospective Self-Denial: Can Consumers Contract Today to Accept Health Care Rationing Tomorrow?*, 140 U. Pa. L. Rev. 1755, 1772-1773 (1992).

Interest groups such as AARP vigorously advocated passage of new legislation that would make employers provide, at their own expense, guaranteed health care benefits. See S. 1757, 103d Cong., 1st Sess. (1993); H.R. 1691 and H.R. 3600, 103d Cong., 1st Sess. (1993). Congress rejected that legislation, leaving intact the employer's right under ERISA to change health care benefits at any time and for any reason. *Curtiss-Wright*, 514 U.S. at 78. This Court should not accept AARP's invitation to impose the very obligations that Congress refused to mandate by creating fictitious bilateral "contracts." AARP's demand for free retiree health care that can never be changed in any respect should be addressed to Congress, not to this Court.

2. Like plaintiffs and the AARP, the Armbruster amici attack strawman rulings the en banc court never made. Amici say they are concerned that the Sixth Circuit's decision permits employers who have made "benefits promises that induce reasonable reliance" to evade their obligations using "secret disclaimers and misleading drafting." Armbruster Br. 2, 5, 11. But the court of appeals determined, as a matter of fact, that GM did not promise that retiree health benefit levels would remain forever unchanged. Pet. App. 20a-24a, 27a. It held that plaintiffs' reliance on GM's

descriptions of current benefits as somehow creating a guarantee of unchangeable future benefits "was not, and could not be, reasonable or justifiable." Pet. App. 27a. And it found that there was nothing "secret" or "misleading" about GM's frequently-repeated reservation of its right to amend the plan. Those reservations were "clearly" and "unambiguously" set forth in the plan and most summary booklets and broadly disseminated to participants. Pet. App. 27a; GM Opp. 2-3. Furthermore, employees knew that GM had frequently exercised its right to amend the medical plan over the years, requiring participants to share the cost of many coverages. See GM Opp. 4.

The Armbruster amici burden this Court (at 6-10) with a long description of pre-ERISA cases decided under the common law of contract, promissory estoppel, and fiduciary duty. Those cases are irrelevant. They involved situations in which plan terms had been modified by agreement or promises of benefits were made and reasonably relied upon. Here, the court of appeals recognized that ERISA plaintiffs may have viable causes of action for breach of contract, promissory or equitable estoppel, and breach of fiduciary duty. It found, however, as a matter of fact, that the parties entered into no contracts modifying the terms of the medical plan, that GM made no promises of free and unchangeable health benefits, that plaintiffs could not reasonably have relied on GM's statements as creating a right to immutable health care benefits, and that GM breached no fiduciary duty. Pet. App. 23a-31a. The Sixth Circuit's fact-bound decision does not provide "less protection" than the pre-ERISA cases. *No* court, before or after passage of ERISA, would have fabricated a promise of unchanging benefits on the basis of the factual record presented here.

The Armbruster brief's invocation of ERISA policy is also misplaced. Although Congress mandated that *pension* benefits vest according to a statutory schedule, it recognized that employers would be deterred from establishing and maintaining *medical* plans if it imposed vesting requirements on such plans. See GM Opp. 29; *Moore*, 856 F.2d at 492; *Adams*, 905 F.2d at 947 ("Congress chose not to impose vesting requirements on welfare benefit plans for fear that placing such a burden on employers would inhibit the establishment of such plans"). Congress therefore determined that employers should be "free under ERISA, for any reason at any

time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright*, 514 U.S. at 78. Congress's goal of encouraging the broader use of medical and other welfare plans would be thwarted if, despite the employer's unambiguous reservations of its right to amend, welfare benefits could be vested—in contravention of the employer's intention—by descriptive language like that involved in this case. As commentators have observed, employers have available an easy way to avoid that sort of unexpected, ad hoc imposition of fixed benefit obligations: they "can anticipate and avoid the problem simply by not providing health and life insurance benefits to retirees." Barnes & Mishkind, *Retiree Health and Welfare Benefits*, 10 Empl. Rel. L. J. 584, 608 (1985). The court of appeals properly held that imposing liability on the facts here "would create disincentives for employers to offer benefits in the first place," which harms "the interests of employees generally" and "is certainly not compatible with the goals of ERISA." Pet. App. 25a.

In short, the key error in both amicus briefs is that they simply *assume* that GM promised early retirees free and unchangeable health care benefits. The voluminous record here established that no such promise was ever made: GM's statements were not promises or contractual undertakings, but simply described "the terms of the current plan" (Pet. App. 20a); the SPDs' context confirmed that they stated that medical benefits (unlike life insurance benefits) would continue after retirement, not that retirees were entitled to frozen benefit levels (see GM Opp. 16 & n.4); GM reserved its right to amend the plan in innumerable documents distributed to employees, and employees knew from firsthand experience that the plan was an evolving one that frequently changed (see GM Opp. 4); and GM's statements *did not even mention copayments or deductibles*, which all employees knew were required for many coverage options and which were subject to periodic change. Pet. App. 4a-5a, 7a; GM Opp. 4. This case is clearly the wrong vehicle to deal with the legal consequences of employer promises to freeze copayments and deductibles.

For nine years, GM's health care plan has been burdened and disrupted by this lawsuit. The district court's injunction cost the company in excess of $10 million annually. It balkanized the plan,

creating special and discriminatory benefits for one subgroup of retirees while imposing numerous administrative inefficiencies and costs on the plan. See GM's Opposition to Application to Extend Stay, A-559, Decl. of Preston Crabill ¶¶ 3-7 (Feb. 3, 1998). Until this litigation is over, disruption and legal uncertainty will continue to burden the plan to the detriment of the employer and plan beneficiaries. Amici have not come close to showing that the Sixth Circuit's case-specific decision conflicts with any ruling of this Court or of another circuit. The Court should deny the petition promptly, allowing GM to administer the plan in the manner Congress intended.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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